Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1996

E.F., A MINOR, BY AND THROUGH MISSISSIPPI PROTECTION AND ADVOCACY SYSTEM, INC., AS GUARDIAN AD LITEM, ET AL., AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

DR. BRENDA SCAFIDI, IN HER OFFICIAL CAPACITY AS DIRECTOR, DIVISION OF CHILDREN AND YOUTH SERVICES, DEPARTMENT OF MENTAL HEALTH, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

SHIRLEY PAYNE
HORN & PAYNE
Post Office Box 1725
Jackson, Mississippi 39215-1725
(601) 373-0170

Counsel for Petitioners

June 2, 1997

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to resolve the conflict in the circuits as to whether § IV-E of the Social Security Act, and related state-federal programs, are enforceable under 42 U.S.C. § 1983?

2. Whether this case should be remanded in light of *Blessing v. Freestone*, ___ U.S. ___, 117 S.Ct. 1353, ___ L.Ed.2d ___, 65 U.S.L.W. 4265 (April 21, 1997)?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding and the Court whose judgment is the subject of this petition is as follows:

1. E.F., Tommy R., Gregory S., Derrick and Desmond W. and the Plaintiff Class certified as "all MP&A eligible children who are, or will be, or who are threatened with or subject to, custodial placement by agencies of the State of Mississippi, in institutional placements, in foster care, or with their families under protective orders, issued at the request of or under the oversight of any Mississippi state agency or agencies."

2. Mississippi Protection and Advocacy System, Inc., guardian ad litem for the child E.F.

3. Defendants in their Official Capacities: Brenda Scafidi, Director, Division of Children and Youth Services, Department of Mental Health; Dr. Randy Hendrix, Executive Director, Department of Mental Health; Mrs. Carolyn Black, Director of the Bureau of Special Services for the Mississippi State Department of Education; Dr. Walter Moore, (former acting) Interim State Superintendent of Education; C. H. Cronin, Superintendent of the Moss Point Separate School District (dismissed by agreement); Christopher M. Cherney, Executive Director of the Mississippi Children's Home Society and Family Service Association and the Gulf Coast Boys' Home (dismissed by agreement); Helen Wetherbee, Director of the Medicaid Commission; Gail Young, Social Worker of the Hinds County Department of Human Services and Custodian of

LIST OF PARTIES – Continued

the Minor Child E.F.; Beatrice J. Branch, (former) Executive Director of the Mississippi Department of Human Services; Sue Hathorne, former Director of the Mississippi Department of Human Services; Greg Phillips, Interim Director of the Mississippi Department of Human Services; Don Taylor, Executive Director of the Mississippi Department of Human Services; and Dr. Tom Burnham, State Superintendent of Education, Mississippi State Department of Education.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals appears at 110 F.3d 793 (5th Cir. 1997) as a decision without published opinion. (App., *infra* 1-2). The opinion of the District Court, (App., *infra* 5 through 24 is unreported.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit decided this case on March 5, 1997. (App., *infra* 1-2). A timely Petition for Rehearing En Banc was denied by the United States Court of Appeals, treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, on April 7, 1997. A copy of the Order denying rehearing appears at (App., *infra* 3-4).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First and Fourteenth Amendments to the United States Constitution, the Americans with Disabilities Act,

42 U.S.C. Section 12101, *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101, *et seq.*, Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. 670, *et seq.*, Social Security Act as amended, particularly, 42 U.S.C. § 620, *et seq.* and 42 U.S.C. § 671 *et seq.*, Titles XIX, XX and Title IV-E, IV-B, and 42 U.S.C. § 1320a-2; the Education for All Handicapped Children Act of 1975, 42 U.S.C. 1302 and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*

STATEMENT OF THE CASE

This case was brought by a class of handicapped children subject to the foster care system of the State of Mississippi. They challenged this system for its failure to provide services and failure to provide coordination of services. The plaintiff class members are under State custody and cannot provide for themselves. This case is analogous to *Blessing v. Freestone*, ___ U.S. ___, 117 S.Ct. 1353, ___ L.Ed.2d ___, 65 U.S.L.W. 4265 (April 21, 1997) because the failures in delivery of services are of similar proportions. The children here are minors, are disabled, and, because they are in State custody, are not free to seek alternative means of support. While the mothers and children affected under the *Blessing v. Freestone* decision had the theoretical opportunity to obtain support from other sources and legal representation from the free market, such is not the case for the disabled children under State custody here presented.

The case below was dismissed on summary judgment. Although the District Court sought to characterize its decision as one based on lack of summary judgment evidence, the District Court applied an incorrect standard of law. The Fifth Circuit Court of Appeals affirmed without written opinion. Prior law in the Fifth Circuit had appeared to support the beneficiaries' enforcement of federal-state programs, *Quarles v. St. Clair,* 711 F.2d 691 (5th Cir. 1983). The District Court's Opinion nonetheless stated: " . . . None of the statutes upon which plaintiffs rely mandates coordination of such benefits/services in such a manner as to give rise to an enforceable right . . . ". (App., p. 14). Similarly, the District Court held, as a matter of law that, Plaintiffs "have not demonstrated that such a failure of coordination of services is required by, or would be actionable. . . . " (App., p. 17). This misstatement of the law was neither addressed by nor corrected by the Fifth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. There is a Conflict Among the Decisions of the Appellate Courts.

The opinions in the various federal courts have split on the manner of enforcement of the Social Security Act and its related state-federal programs, following the decision of this Court in *Suter v. Artist M.,* 112 S.Ct. 1360 (1992). The Fourth, Fifth, Sixth, Seventh, Tenth and D.C. Circuits have limited enforcement. *Stanberry v. Sherman,* 75 F.3d 581 (10th Cir. 1996); *Evelyn v. King County Hospital,* 956 F.Supp. 288 (W.D.N.Y. 1997), *"Tony" L. v. Childers,* 71

F.3d 1182 (6th Cir. 1995) (but mandatory language enforceable); *City of Chicago v. Smith*, 66 F.3d 819 (7th Cir. 1995); *White v. Chambliss*, ___ F.3d ___, 1997 U.S. Dist. LEXIS 9288 (4th Cir. Apr. 30, 1997); *Doe v. District of Columbia*, 93 F.3d 861 (D.C.Cir. 1996). The First, Sixth, Ninth, Eleventh and D.C. Circuits in *Marisol A. v. Giuliani*, 929 F. Supp. 62 (S.D.N.Y. 1996); *Maynard v. Williams*, 72 F.3d 848 (11th Cir. 1996); *"Tony" L. v. Childers*, 71 F.3d 1182 (6th Cir. 1995); *Buckley v. City of Redding*, 66 F.3d 188 (9th Cir. 1995); *LaShawn v. Barry*, 87 F.3d 1389 (D.C. 1996); *Lampkin v. District of Columbia*, 27 F.3d 605 (D.C.Cir.), *cert. denied*, ___ U.S. ___, 130 L.Ed.2d 493, 115 S.Ct. 578 (1994); *Visiting Nurse Assn. of North Shore, Inc. v. Bullen*, 93 F.3d 997 (1st Cir. 1996); and *Jeanine B. By Blondis v. Thompson*, 877 F.Supp. 1268 (E.D. Wisc. 1995) have allowed enforcement of mandatory language or have applied 42 U.S.C. § 1320a-2 which provides:

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in the section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S.Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability. . . .

Congress intends this amendment to benefit the plaintiffs, *See, Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 430, 107 S.Ct. 766, 773-774, 93 L.Ed.2d 781 (1987) and *Blessing, supra*, at 1360, so that

foster children may enforce the statutory provisions that affect them. This case, then, presents the question whether enforceability has been written into the law by Congress.

II. This Court Should Remand in this Case in Light of *Blessing v. Freestone.*

Blessing v. Freestone, ___ U.S. ___, 117 S.Ct. 1353, ___ L.Ed.2d ___, 65 U.S.L.W. 4265, decided during this term on April 21, 1997, left open the possibility that Title IV-D of the Social Security Act "may give rise to some individually enforceable rights." 117 S.Ct. at 1362. Here the Petitioners seek to enforce Title IV-E of the Social Security Act, 42 U.S.C. § 652 *et seq.* The remand in *Blessing v. Freestone* was ordered so that a District Court might proceed to determine which, if any, specific claim asserted in the complaint asserted an individual federal right. The same relief is appropriate here.

Without action from this Court, the ability of the handicapped children to seek or enforce services from their custodians, the agencies of the State of Mississippi, has been effectively foreclosed. Enumerated elements of the foster care system are designed to provide individual rights to the plaintiff children. This law should not be rendered a dead letter.

CONCLUSION

Certiorari should be granted and this case should be remanded for an evaluation by the District Court of the specific areas of the state-federal foster care program which are subject to enforcement by the children beneficiaries of that program.

Respectfully submitted,

SHIRLEY PAYNE
MSB #4071
HORN & PAYNE
P. O. Box 1725
Jackson, MS 39215-1725
(601) 373-0170

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60284

(Filed March 5, 1997)

E.F., A Minor, by and thru Mississippi Protection and Advocacy System, Inc., as Guardian Ad Litem, and all others similarly situated

Plaintiff-Appellant,

v.

BRENDA SCAFIDI, ET AL

Defendants

BRENDA SCAFIDI, Dr, in her official capacity as Director, Division of Children and Youth Services, Department of Mental Health; RANDY HENDRIX, Dr, in his official capacity as Executive Director, Department of Mental Health; CAROLYN BLACK, in her official capacity as Director of the Bureau of Special Services for the Mississipi State Department of Education; WALTER MOORE, Dr, in his official capacity as Interm State Superintendent of Education; HELEN WETHERBEE, in her official capacity as Director of the Medicaid Commission; GAIL YOUNG, in her official capacity as Social Worker of the Hinds County Department of Human Services and Custodian of the Minor Child E.F.; BEATRICE J BRANCH, in her official capacity as Executive Director of the Mississippi Department of Human Services

Defendants-Appellees

Appeals from the United States District Court
for the Southern District of Mississippi
(3:91-CV-591-LN)

Before REAVLEY, KING, and BARKSDALE, Circuit Judges.

PER CURIAM:*

The judgment of the district court is affirmed for essentially the reasons given by the district court in its Memorandum Opinion and Order filed March 13, 1996. All pending motions are denied.

AFFIRMED; MOTIONS DENIED.

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*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60284

E.F., A Minor, by and thru Mississippi Protection and Advocacy System, Inc., as Guardian Ad Litem, and all others similarly situated

Plaintiff-Appellant

v.

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Defendants

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Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Mississippi, Jackson

ON SUGGESTION FOR REHEARING EN BANC

(Opinion March 5, 1997, 5 Cir., ___, ___ F.3d ___)

Before REAVLEY, KING and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

E.F., A MINOR, BY AND THROUGH MISSISSIPPI PROTECTION AND ADVOCACY SUSTEM, INC., AS GUARDIAN AD LITEM, ET AL. PLAINTIFFS

VS. NO. 3:91CV591LN

DR. BRENDA SCAFIDI, IN HER OFFICIAL CAPACITY AS DIRECTOR, DIVISION OF CHILDREN AND YOUTH SERVICES, DEPARTMENT OF MENTAL HEALTH, ET AL. DEFENDANTS

MEMORANDUM OPINION AND ORDER

(Filed March 13, 1996)

This case was commenced by E.F., a minor, by and through the Mississippi Protection and Advocacy System, Inc. (MP&A), as guardian ad litem, against a number of state agencies, namely, the Mississippi Department of Human Services (DHS), the Mississippi Department of Mental Health (Mental Health), the Mississippi Department of Education (DOE), the Division of Medicaid in the Office of the Governor (Medicaid), and the Hinds County Department of Human Services (Hinds DHS). The suit brought by E.F. challenged the adequacy and legality of various actions and policies of the defendant state agencies relative to the provision of financial assistance, facilities, resources and services for children who are under mentally or physically handicapping conditions and who are foster children or who are in or otherwise subject to

custodial care of any of the defendant state agencies. On motion of plaintiffs, this court certified in this case a class of plaintiffs consisting of "all MP&A eligible children who are, or will be, or who are threatened with or subject to, custodial placement by agencies of the State of Mississippi, in institutional placements, in foster care, or with their families under protective orders issued at the request of or under the oversight of any Mississippi state agency or agencies." In certifying that class, the court observed that it was not then considering the merit, or potential merit of any part of plaintiffs' complaint and the court anticipated that defendants would ultimately contest the viability of plaintiffs' claim through appropriate motions. This cause is now before the court on the motion of all defendants to dismiss or, in the alternative, for summary judgment. Plaintiffs have filed a response to the motion. The court, having considered the parties' submissions, concludes that the motion is well taken and should be granted.

Before reaching defendants' arguments in support of their motion, there are collateral matters bearing on this motion which must first be addressed. Defendants filed a comprehensive motion to dismiss, addressing at length what they contended were pleading deficiencies as to each of the plaintiffs' numerous claims in this lawsuit, and further requesting summary judgment in the alternative, in support of which request they provided extensive affidavits from directors of each of the defendant state agencies. In their five-page response to defendants' motion, plaintiffs did little more than deny that defendants' motion should be granted, making only conclusory

statements, unsupported by citation to any factual support or legal authority, to the effect that "[t]he first amended complaint states a claim against the Defendants upon which relief can be granted and, accordingly, cannot and should not be dismissed by the court," and "[s]ummary judgment is not appropriate in favor of the defendants, either in whole or in part, inasmuch as, at the very least, there are genuine issues of material fact regarding whether or to what extent Defendants have complied with applicable federal statutes and the United States Constitution regarding the claims asserted by the Plaintiffs against them." Their response, while unaccompanied by any evidentiary materials, was accompanied by a six-page brief that, with the exception of two sentences, was devoted exclusively to plaintiffs' argument that this court has jurisdiction of their claims asserted under the Adoption Assistance and Child Welfare Act, 42 U.S.C. § 670 *et seq.* In other words, in their response, plaintiffs wholly failed to mention, much less address, the greater portion of defendants' motion, and made no effort to rebut defendants' proof.

With their rebuttal to plaintiffs' response, defendants submitted a supplemental affidavit from Edwin H. Henry, Director of the Division of Family and Children's Services, a Division of the Mississippi Department of Human Services (DHS) (ostensibly to "update and supplement" the position of the DHS), in which Mr. Henry set forth the favorable results of a triennial review of DHS's compliance with the applicable provisions of the Social Security Act, provided information regarding the current status of plaintiff E.F., and espoused his view that the defendant state agencies have no duty to coordinate their services

under the Adoption Assistance and Child Welfare Act (contrary to plaintiffs' major contention in this lawsuit). This single affidavit submitted by defendants has evoked a response by plaintiffs "in opposition to defendants' supplemental materials," in which they contend that they now need to depose Mr. Henry so that they can "adequately understand the basis for his assertions." Moreover, they maintain that they now also need to depose Pat Lawler, Administrator of Youth Villages in Memphis, Tennessee, apparently on the subject of Mississippi's failure to provide "critical transitional and after care services for children." They further insist that a designee of Federal Department of Health and Human Services must be deposed "in order to reach the foundation for any valid conclusions in this litigation concerning (a) Mississippi's compliance with federal mandates, (b) Mississippi's pilot programs, if any, (c) the extent to which Mississippi has been ruled out-of-compliance since 1990, and (d) comparisons with other State plans which effectively deliver cooperation among the agencies charged with child care responsibilities." And they want to depose an appropriate designee of the State Youth Court Judges in order to identify, *inter alia*, problems in delivery of services under Court order and the "failure of enforcement of Review Team planning for hard to place children." Additionally, plaintiffs ask to depose Michael Petit of the Child Welfare League of America, who, according to a story in the Jackson newspaper, *Clarion Ledger* (a copy of which plaintiffs have attached to their response in opposition), conducted a study as a contracting entity of the State DHS which revealed "the level of bring to light any significant new facts or evidence that had not been available to

plaintiffs through discovery of other DHS personnel. Defendants requested, *inter alia*, that the court strike from the record the *Clarion Ledger* article, and the deposition excerpts that had been belatedly submitted by plaintiffs. Inexplicably, plaintiffs have responded to defendants' motion to strike by filing even more evidentiary materials, and particularly, an affidavit of Sue Cannimore, a MP&A employee, regarding "the most current status of the named plaintiff class representatives," and an affidavit from Diane Butler, the mother of an emotionally disturbed child, which plaintiffs characterize as addressing "other and ongoing problems within the foster care system." Plaintiffs' filing of these affidavits, with no explanation whatsoever, was again met by an objection and motion to strike by defendants. Plaintiffs defend their late submission of these materials on the bases that "[d]efendants did not file a Rule 56 Motion but rather styled their Motion one to dismiss," and that plaintiffs' materials were intended to refute the additional allegations contained in defendants' supplemental materials, i.e., the Henry affidavit.

In the court's opinion, defendants' motion to strike, and their second motion to strike plaintiffs' evidentiary submissions should be granted. The court would surely have been inclined to allow plaintiffs an opportunity to attempt to refute the assertions in Mr. Henry's supplemental affidavit with proper proof. However, there is no basis whatsoever for viewing that single, relatively insignificant affidavit as providing a basis for reopening discovery in the manner proposed by plaintiffs, nor does the court consider plaintiffs' recent evidentiary submissions

as responsive to the matters set forth in the Henry affidavit. Plaintiffs have had more than adequate opportunity for discovery in this case (which has been pending since 1991), and have, in fact, conducted substantial discovery. With respect to their present request to depose Mr. Henry, the court agrees with defendants' assessment: the Henry affidavit sets forth no new facts that plaintiffs could not have learned through discovery. Indeed, it seems to the court that the primary basis for plaintiffs' request to depose Mr. Henry is his assertion that the State DHS is not required to coordinate its services with the other defendants, and that while its plan provides for coordination of services, DHS "cannot compel another state agency to develop or provide certain services for our access to better serve children and families." Plaintiffs would be hard pressed to contend to this court that they were unaware that this was defendants' position in this case. With respect to plaintiffs' request to depose other individuals, the court would observe simply that the discovery deadlines have long passed and plaintiffs have offered no good reason for reopening them to allow these depositions.

Again, plaintiffs suggest that their recent submission of deposition testimony and affidavits is warranted since defendants' motion was one to dismiss and, was not one for summary judgment. That simply is not so. The motion was clearly styled a motion to dismiss or, *in the alternative,* for summary judgment. The motion included a number of affidavits pertinent only to its request for summary judgment, and defendants argued their motion with specific reference to those affidavits. The court cannot fathom how plaintiffs could possibly have been

unaware that defendants were seeking summary judgment in the event the court declined their motion to dismiss. But in any event, such an oversight does not justify allowing plaintiffs to belatedly file evidentiary materials which should have been filed in response to defendants' motion.[1] The court is further of the opinion that plaintiffs' second justification for offering these materials – that they were intended to rebut the statements in Mr. Henry's affidavit – lacks merit. Accordingly, the court will grant defendants' motion to strike plaintiffs' evidentiary offerings. That brings the court, then, to defendants' motion to dismiss or, in the alternative, for summary judgment.

A review of plaintiffs' first amended complaint reveals claims asserted under the First and Fourteenth Amendments of the United States Constitution, as well as a number of federal statutes, namely, the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq.*; The Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101, *et seq.*; the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670, *et seq.*; the Social Security

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[1] The court would also point out that even when plaintiffs filed these materials in their "response in opposition" to the Henry affidavit and then later filed their supplemental submission, they did not argue that the testimony they offered created a genuine issue of material fact, or even that it should be considered in connection with defendants' summary judgment motion. Moreover, even if there were some arguable basis for considering the first materials they supplied, plaintiffs have never explained why they did not include the second set of materials in their original response in opposition to the Henry affidavit.

Act, as amended, particularly 42 U.S.C. § 620, *et seq.*, and 42 U.S.C. § 671, *et seq.*, Titles XIX, XX and Titles IV-E and IV-B; the Education for All Handicapped Children Act of 1975, 42 U.S.C. § 1302; and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.* Defendants seek dismissal or summary judgment as to each of these claims on a variety of grounds.

Defendants submit that the first amended complaint fails to state a claim upon which relief can be granted under the Adoption Assistance and Child Welfare Act (AACWA), as amended, 42 U.S.C. §§ 620-628, and §§ 648-658, since the Supreme Court ruled in *Suter v. Artist M.*, 503 U.S. ___, 112 S. Ct. 1360 (1992), that § 671(a)(15) of the AACWA did not confer an enforceable private right on the beneficiaries of the Act, nor did it create an implied cause of action on their behalf. The AACWA conditions the availability of federal funding to a participating state on the state's submitting and receiving approval of a plan for child welfare services that meets statutorily prescribed criteria. In *Suter*, the Court held that a cause of action was only available against a state under the AACWA to challenge the state's failure to have such a plan. In 1994, however, Congress legislatively overruled that part of *Suter*'s holding by enacting the following amendment to the AACWA:

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements

> other than by overturning any such grounds applied in Suter v. Artist M., 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability. . . .

42 U.S.C. § 1320a-2. In the court's opinion, even though *Suter* no longer wholly forecloses private causes of action under the AACWA, plaintiffs, in response to defendants' motion, have not shown that they have presented a viable claim against any defendant for violation of the AACWA.[2]

In their complaint, plaintiffs list a number of requirements imposed on states by the AACWA, including the requirements (a) that state and local programs to provide assistance to children eligible to receive foster care maintenance payments be coordinated with each other and with appropriate provisions of federal law; (b) for fair hearings; (c) review for failure to act with reasonable promptness; (d) appointment of guardians ad litem; and (e) development of individualized case plans and timely review of such case plans and actions in accordance with those plans. Yet plaintiffs do not identify which, if any, of these provisions they contend have been violated, or in what manner any of these provisions is alleged to have been violated. Moreover, in response to defendants' motion, which is supported by evidentiary submissions,

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[2] The court observed *supra*, that plaintiffs had devoted their response brief solely to proving the proposition that this court has jurisdiction of their AACWA claim. Their whole argument in that regard was premised on the 1994 amendment to the AACWA which overruled *Suter*. Plaintiffs proceeded no further than establishing that *Suter* no longer stands as an impediment to this claim.

plaintiffs have presented no evidence that any defendant has violated any provision of the AACWA.

Plaintiffs' primary claim appears to be that defendants have violated the various cited federal statutes, and most particularly the AACWA, by failing to "coordinate" their services for the benefit of children entitled to those services. But as defendants point out, none of the statutes upon which plaintiffs rely mandates coordination of such benefits/services in such a manner as to give rise to an enforceable right. Rather, at best, some of the federal statutes cited by plaintiffs provide for coordination where "appropriate and feasible." Moreover, defendants' affidavits establish that the various state agencies do coordinate and cooperate with one another on a voluntary basis for the benefit of the children in the class. Plaintiffs have submitted no evidence to the contrary. Plaintiffs' AACWA claim will be dismissed.

Plaintiffs charge that "defendants" have violated the Individuals with Disabilities Education Act (IDEA), which they allege requires the "State Department of Education (DOE) and local school districts, and other responsible agencies to cooperate among themselves to provide a free, appropriate education, related services, and procedural safeguards for [the named plaintiffs' and class members], in regular or special classrooms or in residential placements." As the IDEA clearly imposes no specific duty on any defendant other than the DOE, plaintiffs have apparently directed their allegations of IDEA violations against all defendants on the theory that all defendants had some duty to "cooperate" in providing a free, appropriate education to class members. Manifestly, the only defendant that could even arguably be said to have

had such a duty to "cooperate" is the DOE, so that any putative claim against any other defendant for any alleged violation of the IDEA is clearly due to be dismissed. For other, equally compelling reasons asserted in defendants' motion, the DOE is also entitled to be dismissed as to these claims.

Defendants agree that each plaintiff and class member represented by the named plaintiffs is entitled to a free, appropriate education (FAPE) driven by an individualized education plan (IEP)[3] if he or she has a disability as defined under IDEA which adversely affects his or her educational performance. But defendants deny that plaintiffs have alleged any viable systemic, class-wide claims for violations of the IDEA. Indeed, plaintiffs do insinuate in their complaint that the named plaintiffs, and perhaps other class members, have been denied the FAPE to which they are entitled by virtue of the IDEA. But their allegations, taken as a whole, do not suggest there has been any systemic failure to comply with any provision of the IDEA. Again, plaintiffs maintain, apparently, that some of the named plaintiffs have not received the FAPE to which they are entitled. But as defendants point out, there can be no such class-wide claim against DOE since what is appropriate for each individual child will necessarily vary from child to child, and in fact, will vary for each child from time to time as his or her needs change.

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[3] An IEP contains a written statement of the child's present education performances, establishes annual and short term instructional objectives, describes the special education services that will be provided to the child, and sets forth the criteria and procedures that will be used to evaluate whether these educational goals have been achieved. 20 U.S.C. § 1401(a)(19).

Hence, the class-based claims for alleged violation of the IDEA will be dismissed. The question then becomes whether any of the named plaintiffs may proceed against the DOE for alleged violations of the IDEA. The answer to that question is no.

The Fifth Circuit has held that, "beyond doubt," § 1415 of the IDEA, which prescribes the administrative review procedures that a state educational agency or local school district must provide, requires that a plaintiff must first exhaust the state administrative remedies provided him or her before bringing an action in federal court. *Gardner v. School Bd. of Caddo Parish*, 958 F.2d 108, 111 (5th Cir. 1992). Defendants have presented unrefuted evidence that none of the named plaintiffs has exhausted the administrative remedies required of him. The court concludes, therefore, that their claims under the IDEA must be dismissed.

Plaintiffs state in their complaint that the Child Abuse Treatment and Prevention Act (CAPTA) requires "effective coordination among programs related to child abuse and neglect and other such programs which are assisted by federal funds," *see* 42 U.S.C. § 5106(e), and requires further that the defendant state agencies provide needed services to abused and neglected children including emergency caretaker services, emergency shelter care or medical services, review by a multidisciplinary team, court actions as appropriate to protect the child, actions to help parents or guardians in their responsibilities, and actions to remove the child from a dangerous situation, *see* 45 C.F.R. § 1340.14(f). They then conclude that the "acts and omissions of Defendants" violate CAPTA's "effective coordination" requirement. Plaintiffs further

allege generally that defendants have failed to provide those emergency services needed to protect "the child's" health and welfare. In the court's opinion, plaintiffs have not sufficiently stated a claim for relief under CAPTA.

CAPTA does provide for the coordination of child abuse and neglect programs, and more specifically, requires that the *Secretary of the United States Department of Health and Human Services* "prescribe regulations and make such arrangements as may be necessary or appropriate to ensure that there is effective coordination among programs related to child abuse and neglect. . . . " Toward that end, the Secretary of Health and Human Services has required that "[a]ll *federal agencies* responsible for programs related to child abuse and neglect . . . provide information as required by the Commissioner to insure effective coordination of efforts." 45 C.F.R. § 1340.4 (emphasis added). The court has found no specific statute or regulation directing that any state or state agency take any specific steps to achieve the "effective coordination" referenced by CAPTA. Thus, even if plaintiffs had presented proof to substantiate their claim of a failure of coordination of services (which they have not), they still could not prevail since they have not demonstrated that such a failure of coordination of services is required by, or would be actionable under CAPTA.

Additionally, while plaintiffs complain generally that defendants have failed to provide the various types of emergency services prescribed by CAPTA, plaintiffs have identified no specific case of abuse or neglect in which any defendant failed or omitted to appropriately respond, nor have plaintiffs presented any evidence that such omissions have occurred. In short, defendants steadfastly

maintain that there has been at least substantial compliance with each and every requirement imposed by CAPTA (as well as each of the other federal acts upon which plaintiffs base their suit), and plaintiff's have not demonstrated otherwise.

Plaintiffs further allege that in violation of the Medicaid Act, 42 U.S.C. § 1396a, and Title XIX and Title IV-B of the Social Security Act, the "defendants" have failed to provide for medical expenses, including psychotherapy and residential placement, and to supply transportation as a support service to enable plaintiffs and plaintiff class members to receive other needed services. Again, while plaintiffs purport to assert this claim against all of the named defendants, it is apparent to the court that the only defendant that might properly be the subject of such a charge is the Division of Medicaid. However, even that defendant is entitled to have plaintiffs' claims against it dismissed since plaintiffs have neither alleged nor proved that any named plaintiff or any member of the plaintiff class has been denied eligibility for Medicaid or, if eligible, has been denied Medicaid coverage for the services specified by their allegations. According to the uncontested affidavit of Helen Wetherbee, Executive Director of the Division of Medicaid, each of the plaintiffs in the class that has been identified to the Division of Medicaid is and has been Medicaid eligible and Medicaid has paid and will continue to pay for medical services for each child that is covered by Medicaid as long as the child is eligible for Medicaid assistance. For those members of the plaintiff class about which the Division of Medicaid has been given no specific information, the Division, according to Ms. Wetherbee, is not aware of any child that has

been denied Medicaid eligibility or, if eligible, has been denied a Medicaid service. It bears repeating that plaintiffs, in response to defendants' motion, have provided no evidence to contradict Ms. Wetherbee's testimony in this regard. That is, they have neither alleged nor provided evidence that any member of the plaintiff class has been wrongly denied Medicaid eligibility or wrongfully denied funding for a Medicaid-covered service. It must be concluded, therefore, that judgment is properly entered against plaintiffs on their claims of failure to provide Medicaid-covered services.

Like the defendants, this court has difficulty discerning the nature of plaintiffs' purported claim under § 504 of the Rehabilitation Act, 29 U.S.C. § 794, *et seq.*, as well as their claim under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* Plaintiffs allege in the broadest and most general of terms that the named plaintiffs and members of the plaintiff class have been discriminated against because of their alleged disabilities. But plaintiffs have wholly failed to identify any specific service or benefit claimed to have been denied them on account of a disability, or any program or activity from which they claim to have been precluded from participating by virtue of an alleged handicap or disability. In this regard, plaintiffs' submissions to the court in response to defendants' motion are no more illuminating on the subject than their complaint. Such vague assertions as plaintiffs have made do not, in the court's opinion, adequately state a claim against any defendant. Moreover, all defendants have presented proof, in the form of affidavits, that they have

not discriminated against the named plaintiffs, or members of their class, as a result of any handicap or disability they may be alleged to have, and plaintiffs have presented no contrary proof. In fact, plaintiffs' response does not even mention these putative claims (other than citing the statutes). Thus, even if dismissal were not appropriate on the basis of plaintiffs' deficient pleadings, summary judgment would be proper.

Furthermore, the court assumes, from the tenor of plaintiffs' complaint, that plaintiffs' Rehabilitation Act claim (and likely their ADA claim, as well) relates primarily, if not exclusively, to the Department of Education, as plaintiffs appear to contend that one or more of the named plaintiffs has been denied a free, appropriate education based on their handicapping conditions. However, it has been generally recognized that actions brought under § 504 of the Rehabilitation Act must give way to proceedings under IDEA where the two statutes converge. *Georgia Ass'n of Retarded Citizens v. McDaniel*, 740 F.2d 902 (11th Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985) (a plaintiff asserting a valid claim under the IDEA cannot also proceed under the Rehabilitation Act); *Turillo v. Tyson*, 535 F. Supp. 577 (D.R.I. 1982). More to the point, a plaintiff cannot avoid the administrative exhaustion requirement of the IDEA by resort to the Rehabilitation Act where the matter at issue is covered by the IDEA. *Hayes v. Commission on State Mandates*, 15 Cal. Rptr. 2d 547, 754 F. Supp. 906 (Cal. App. 3d Dist. 1992) (dissatisfied parties in recipient states must exhaust administrative remedies under IDEA). Moreover, the defendants have provided the affidavit of Carolyn Black, Director of the Office of Special Education, an office of the State

DOE, wherein she maintains that the DOE has no policy which allows the denial of admission to a school district for plaintiffs and members of their class which violates § 504, or, for that matter, the IDEA or ADA. Plaintiffs have come forward with no proof to support their contrary allegation. That is, plaintiffs have failed to present any evidence of the existence of any such policy of discrimination.

In addition to their claims that defendants have violated the various federal statutes identified *supra*, plaintiffs also charge defendants with violations of their constitutional rights under the First and Fourteenth Amendments, alleging, for example, that defendants have engaged in conduct that violates their Fourteenth Amendment rights to due process and equal protection; their Fourteenth Amendment due process rights to "safe conditions of confinement and freedom from harm," to "adequate food, shelter, clothing and medical care, to conditions of reasonable care and safety, and to freedom from bodily restraint," to "adequate and effective treatment in the least restrictive environment," and to "a humane physical and psychological environment, to be treated in a facility that employs qualified staff in numbers sufficient to administer adequate treatment and to an individualized treatment plan." They charge further that defendants have abridged their First Amendment rights to association with "their families, their peers and the least restrictive interactions with their communities." And finally, they assert that defendants' acts have deprived them of their Fourteenth Amendment right to travel.

These conclusory allegations are, in the court's opinion, unsupported by any factual allegations in the complaint. That is, plaintiffs fail to explain the basis for any of these conclusions. So far as the court can tell, for example, there are no factual allegations in the complaint to support the conclusion that any plaintiff or member of the plaintiff class has been denied his constitutional rights to "safe conditions of confinement," "freedom from harm," "adequate food, shelter, clothing and medical care," "freedom from bodily restraint," or "a humane physical and psychological environment."[4] Plaintiffs allege that they are entitled to placement in the least restrictive environment, but regarding a similar claim, one court has observed as follows:

> Plaintiffs who have been involuntarily placed in the custody of the DHS have substantive due process rights under the fourteenth amendment to be free from harm while in state custody. Thus, Defendants have an affirmative duty to provide these Plaintiffs with adequate food, shelter, clothing, medical care and reasonable safety under *DeShaney*. Defendants are not required under the Constitution to provide

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[4] Of course, "the Constitution does not generally require governments to act affirmatively to provide services and care," *Jeanine B. by Blondis v. Thompson*, 877 F. Supp. 1268, 1277 (E.D. Wis. 1995), though "certain affirmative duties arise from the Constitution when a 'special relationship' exists between the plaintiff and the government," *id.*, such as when the plaintiff is in government custody, *id.* (citing *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 200-01 (1989)). Thus, only such plaintiffs as who are actually in government custody have standing to assert these claims.

> Plaintiffs with an optimal level of care and treatment. . . . Plaintiffs' claim to the least restrictive, most appropriate treatment is simply a request for "optimal" treatment while in the custody of the state.

Baby Neal v. Case, 821 F. Supp. 320, 327 (E.D. Pa. 1993).

Moreover, defendants asserted in their motion and brief that the one named plaintiff who was actually in foster care custody, E.F., is having his "least restrictive placement" needs met. Plaintiffs have produced no evidence to the contrary.[5] In sum, the court simply is unable to discern any potentially viable constitutional claim by plaintiffs. Defendants' motion will be granted on any putative constitutional claim.

Based on the foregoing, it is ordered that defendants' motion to dismiss or, in the alternative, for summary judgment is granted as set forth herein.

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[5] When the motion was originally filed, E.F. was in the custody of the Hinds County DHS and, according to the affidavit of Gregg Phillips, was at DePaul Hospital in New Orleans, Louisiana. This placement, according to Phillips, was the "least restrictive environment available to meet his needs," and his placement at DePaul had been approved by counsel for the plaintiffs. In their response, plaintiffs did not contend otherwise. Edwin Henry's affidavit updating the information on E.F. revealed that E.F., whom he characterized as "the only Plaintiff herein who is in the custody of MDHS," was placed in Pine Point Treatment Center in Jackson, Tennessee, "in accordance with his psychiatric team's recommendation and with the approval of counsel for said Plaintiff." While plaintiffs undertook to respond to Henry's affidavit, as detailed *supra*, no claim was made that E.F.'s placement was not appropriate and nothing was said to refute Henry's assertion that the placement was made with E.F.'s consel's [sic] approval.

A separate judgment will be entered in accordance with Rule 58 of the Federal Rules of Civil Procedure.

ORDERED this 13th day of March, 1996.

/s/ Tom S. Lee
UNITED STATES
DISTRICT JUDGE